IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITON NO.388 OF 2005

Union of India & Anr. ..Petitioners.

V/s.

Sir Hurkisondas Nurottam Hospital &
Medical Research Centre ..Respondent.

Mr.R.V.Desai, senior counsel with K.R.Chaudhari for petitioners.

Mr.J.J.Bhat with Rohan Shah i/b.A.S.Daya & Associates for respondent.

CORAM : V.C. DAGA AND
J.P.DEVADHAR, JJ.

DATED : 13TH APRIL, 2005.

P.C. :-

1. Heard the learned counsel for the petitioners. This petition is directed against the order dated 16/2/2004 whereby the Tribunal has modified its earlier order dated 17/1/2003 directing pre-deposit of the entire duty amount in the sum of Rs.76,48,320/-.

2. Mr.R.V.Desai, learned senior counsel appearing for the petitioners contended that in the garb of modification the Tribunal has virtually reviewed its own order dated 17/1/2003. He submits that the Tribunal does not have inherent powers to review and, therefore, the impugned order is liable to be set aside. He also contends that the order is without jurisdiction.

3. Mr.Desai relied upon the Division Bench Judgment of this very Bench in the case of **Baron International Ltd. V/s. Union of India** reported in **2004 (163) E.L.T. 150 (Bom.)**; wherein this Court has taken a view that there is no inherent powers in the Tribunal to review its own order. In addition to this, Mr.Desai also relied upon the Judgment of the Apex Court in the case of **Commissioner of Central Excise, Vadodara V/s. Steelco Gujarat Ltd.** reported in **2004 (163) E.L.T. 403 (S.C.)**, wherein the Apex Court also ruled that the power to review is not inherent unless it is expressly granted by the statute. The Apex Court also ruled that no such inherent powers to review is granted under the provisions of the Central Excise Act, 1944 to CESTAT. Only limited power to rectify mistake is given to the Tribunal under section 35C(2).

4. In the above backdrop, only question which needs consideration is: whether the impugned order can be said to be an outcome of the review jurisdiction or could it be referred to the limited power of the Tribunal to rectify mistake apparent on the face of the record under section 35C(2) of the Act.

5. Having heard rival parties, one may notice that the Apex Court in the very same Judgment i.e. Commissioner of Central Excise, Vadodara V/s. Steel Gujarat Ltd. (cited supra), after taking survey of the

limited power which exist in favour of the Tribunal under section 35C(2) of the Act; proceeded to observe as under:-

> " Although the ground for rectification, namely, an error on the face of the record may be common to a power for review, the nature of the power to be exercised in the two cases is distinct. The power of review is not limited to rectification and is wider than the power conferred under Sec.32C(2). We are unable to hold that the error was a manifest one which could admit of no dispute. It was a debatable point which was raised, and the conclusion of the Tribunal in the impugned order clearly shows that it has considered the question from the point of view of the sufficiency of the material to justify the demand raised. In the circumstances of the case we allow the appeals and set aside the impugned order of the Tribunal. We are told that the respondent has in the meanwhile filed a reference application under Sec.35G of the Act before the Tribunal. In view of our order, the Tribunal can now hear and dispose of that application as expeditiously as is conveniently possible. There will be no order as to costs."

4. Reading of the aforesaid para will go to show that the Apex Court in unequivocal terms ruled that though the ground for rectification, namely, an error on the face of the record may be common to a power for review, the nature of the power to be exercised in the two cases is distinct. The power of review is not limited to rectification and is wider than the power conferred under section 35C(2). Reading of section 35C(2) will further show that while granting limited powers to rectify the order on the ground of mistake apparent on the face of record, one of the shades of power to review appears to have been conceded by the legislature in favour of the Tribunal so as to enable the Tribunal to rectify its

mistake or error and to modify its order. Tribunal cannot review its order but can always modify.

5. Turning to the facts of this case, it is prima facie clear from the order dated 17/1/2003 (opening para) that the appellants did not desire to redeem the impugned goods which have been confiscated and, therefore, they could not be asked to pay the duty under section 125(2) of the Customs Act, 1962. If the appellants were not interested in redeeming the goods, then, the Customs Act does not create liability to pay the customs duty. If the statute does not create liability to pay duty, one fails to understand how the appellant could be directed to make the pre-deposit. Therefore, the order of the Tribunal dated 17/1/2003 did suffer from a mistake or error apparent on the face of record, as such it could rectify its order in exercise of its power under section 35C(2). Thus, the impugned order can be justified under section 35C(2) of the Act. In this view of the matter, we do not see any reason to interfere with the impugned order justifying dispensation of pre-deposit in the present case.

6. The petition is, therefore, dismissed in limine with no order as to costs.

(V.C. DAGA, J.)

(J.P.DEVADHAR, J.)